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Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

THOMAS CHRISTIE,
Petitioner

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the court of appeals decline to rule on a jurisdictional issue on the basis of Appellant waiver when the jurisdictional defect first became apparent when the government stated in its brief (in contravention of its earlier acquiescence to the plea) that the appellant's conditional plea was based on a non-case-dispositive issue?

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of these proceedings.

Appellant: Thomas Christie, # 12506-035, Federal Medical Center, P.O. Box 14500, Lexington, KY 40512.

Attorney: Gordon N. Blackman Jr. (Writ), 400 Travis Street, Suite 1801, Shreveport, LA 71101-3196.

Chris Aberle (on Appeal), Attorney at Law, P. O. Box 8583, Mandeville, Louisiana 70470-8583.

Peter Reichman Flowers, (Trial) 101 Milam Street, Shreveport, LA 71101

Appellee: The United States of America.

Attorney: Josette Cassiere, AUSA, WD La., (Appeal) 300 Fannin Street, Suite 3201, Shreveport, LA 71101.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed, *United States v. Christie*, No. 05-31080 (5th Cir., 2006), appears as Appendix A.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Fifth Circuit entered its judgment on December 7, 2006. Appendix, App-1. Rehearing was denied on January 22, 2006, Appendix, App-2. Petitioner, Thomas Christie, seeks review of that judgment on a writ of certiorari. The present petition is timely filed under 28 U.S.C. §2101(c) and under Rule 13.3 of this Court. This Court has jurisdiction under 28 U.S.C. §1254(1) to review on writ of certiorari the judgment of a federal court of appeals.

STATUTORY PROVISIONS INVOLVED IN CASE

Fed. R.Cr.P., Rule 11. Pleas

(a) Entering a Plea.

(1) In general. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal

may then withdraw the plea.

* * *

18 U.S.C. § 2252A(a)(5)(b)

§ 2252A. Certain activities relating to material constituting or containing child pornography

(a) Any person who--

* * *

(5) either--

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151 [18 USCS § 1151]), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

* * *

STATEMENT OF THE CASE

The Government charged Thomas Christie by indictment on October 13, 2004, with one count of possession of child pornography.[1] On June 3, 2005, Mr. Christie moved to suppress the evidence seized from his business computer.[2] The motion did not include evidence that had been seized from other computers in his residence. The magistrate judge heard the matter on July 21, 2005, and recommended denying the motion in a report issued on August 12, 2005.[3]

Preserving his right to appeal that ruling, pursuant to a written plea agreement, Mr. Christie pleaded guilty before the magistrate judge on August 29, 2005.[4] Over Mr. Christie's objections,[5] the district court adopted the magistrate judge's report and recommendation on the Motion to Suppress on September 27, 2005.[6] The district judge accepted the conditional guilty plea heard by the magistrate without objection on November 17, 2005, and on November 30, 2005, the court sentenced Mr. Christie to the statutory minimum sentence of ten years.[7] Mr. Christie appealed to the Fifth Circuit Court of Appeals.[8]

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[1] R. 13-15. *See* 18 U.S.C. § 2252A(a)(5)(b).
[2] R. 91-97.
[3] R. 119, 148-64.
[4] R. 169; *see* sentencing transcript at p. 7.
[5] R. 187-93
[6] R. 194.
[7] R. 201, 204.
[8] R. 213.

Mr. Christie briefed the denial of the Motion to Suppress in his original brief to the Fifth Circuit. The Government in its response to Mr. Christie's brief argued that the Court of Appeals should dismiss the appeal on the basis that suppression of the evidence asserted by Mr. Christie as unconstitutionally obtained would make no difference in the disposition of the case. Appeal counsel moved for permission to supplement the original brief, which was granted, and asserted that the conditional plea was invalid as having been made conditioned on the appeal of a non-case-dispositive issue. The Court of Appeals declined to address the issue as having been waived and ruled on the merits of the motion to suppress, affirming the ruling of the District Court.

ARGUMENT

A guilty plea that purports to reserve the right to appeal a non-case-dispositive pretrial ruling is invalid and must be vacated.

A guilty plea that purports to reserve the right to appeal a non-case-dispositive pretrial ruling is invalid and must be vacated. As the government concedes, Mr. Christie was allowed to condition his guilty plea on the right to appeal the refusal to suppress the office-computer evidence, even though, according to the government, the unchallenged residential-computer evidence is sufficient to support the plea and sentence.

The government argued in its brief to the Fifth Circuit that the court should not waste its time

addressing Mr. Christie's challenge to the suppression ruling and should instead dismiss the appeal because a successful challenge to that ruling would not affect his guilty plea. The government reasoned that if the evidence seized from the office computer were suppressed, the evidence obtained from the computer in Mr. Christie's house, which was not challenged in the motion to suppress, is independently sufficient to support both the plea and the sentence.[9]

While this might be an effective argument after a conviction based on a trial, this argument, of course, ignores the plain text of Rule 11(a)(2), which provides: "A defendant who prevails on appeal may then withdraw the plea." The government's argument, implicitly concedes that the government erred when it consented to Mr. Christie's guilty plea, and it is therefore invalid and should have been vacated. The government is in a unique position to judge whether an issue is case-dispositive. The Advisory Committee on the 1983 amendments of Rule 11which included the addition of 11(a)(2) that added the procedure for conditional pleas opined that the reason for requiring the government's consent to a conditional plea was to insure that such would only be used for case-dispositive issues.

The courts, including the Fifth Circuit, have uniformly recognized that a conditional guilty plea is valid only if it reserves for appeal a "case-

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[9] Government's brief on appeal at 11-13.

dispositive" pretrial ruling.[10] When the disposition of a pretrial issue is case-dispositive, "there should be no trial after the specified issues are resolved by the court of appeals."[11] This would occur, for example, when a ruling in the defendant's favor would require suppression of "essential evidence."[12] When a conditional plea has found its way to the Courts of Appeals without a proper case-dispositive issue, the result has been remand to the district court with instructions to vacate the guilty plea as invalid. Generally the courts have found the requirement of a case-dispositive issue to be jurisdictional, stating that the court of appeals does not have jurisdiction to hear a case without a case-dispositive issue. See for example *Bundy*[13] where the 4th Circuit determined that the defendant had preserved a non-dispositive issue and reversed the conviction and remanded on its own motion.

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[10] *See United States v. Bell*, 966 F.2d 914, 916 (5th Cir. 1992); *United States v. Burns*, 684 F.2d 1066, 1072 (2d Cir. 1982); *United States v. Bentz*, 21 F.3d 37, 42 (3d Cir. 1994); *United States v. Bundy*, 392 F.3d 641, 647 (4th Cir. 2005); *United States v. Yasak*, 884 F.2d 996, 999 (7th Cir. 1989); *United States v. Scott*, 884 F.2d 1163, 1165 (9th Cir. 1989).

[11] *Bundy*, 392 F.2d at 648.

[12] *See* FED. R. CRIM. P. 11, advisory committee's note; *United States v. Wong Ching Hing*, 867 F.2d 754, 758 (2d Cir. 1989); *Bentz*, 21 F.3d at 42; *Bundy*, 392 F.2d at 648; *United States v. Rogers*, 387 F.3d 925, 932 (7th Cir. 2004).

[13] *U.S. v. Bundy, supra.*

To insure that the defendant enters a valid conditional guilty plea, Rule 11 requires that the plea be entered only with "the consent of the court and the government." The Government should "exercise vigilance" in consenting to a conditional plea,"[14] as it "is in a unique position to determine whether the matter at issue would be case-dispositive,"[15] and, with respect to a pre-trial ruling on a motion to suppress, "the Government is best positioned to know what effect suppression of certain evidence would have on the case."[16]

In strenuously arguing that Mr. Christie's appeal is a vain and useless exercise in light of the evidence not challenged in the motion to suppress, the Government implicitly concedes with equal strenuousness that it was remiss in allowing Mr. Christie to enter a conditional plea. Accepting the Government's contention that the district court's denial of the motion to suppress is a non-case-dispositive ruling, the Government effectively concedes that Mr. Christie's plea is not valid.

"The alternatives to a conditional plea being entered are either that an unconditional plea has been entered or that no [valid] plea has been entered."[17] Consequently, a conditional guilty plea premised on the right to appeal a non-case-dispositive issue is invalid and must be vacated; the

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[14] *Burns*, 684 F.2d at 1073.

[15] Rule 11, advisory committee's note.

[16] *Bundy*, 392 F.2d at 648.

[17] *Bundy*, 392 F.3d at 649 (quoting *United States v. Carrasco*, 786 F.2d 1452, 1454 n. 2 (9th Cir. 1986)) (brackets in original).

defendant must be given the opportunity to plead unconditionally or proceed to trial.[18]

CONCLUSION

For these reasons, the court should grant this writ of certiorari, vacate the ruling of the Court of Appeal, and remand with instructions that the invalid guilty plea of Mr. Christie be vacated and that the matter be remanded to the District Court for further proceedings.

RESPECTFULLY SUBMITTED,
Gordon N. Blackman, Jr.
(Counsel of Record)
Attorney for Petitioner, Thomas Christie
April 23, 2007

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[18] *Id.*, at 649-50; *Wong Ching Hing*, 867 F.2d at 758; *United States v. Curcio*, 712 F.2d 1532, 1545 (2d Cir. 1983).

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 05-31080
UNITED STATES OF AMERICA, Plaintiff - Appellee
v. THOMAS CHRISTIE, Defendant - Appellant

Appeal from the United States District Court
for the Western District of Louisiana
No. 5:04-CR-50140

Before SMITH, BENAVIDES, and PRADO, Circuit Judges. Filed 12/7/2006, Reh. Den. 1/22/2007.

PER CURIAM:*

Defendant-Appellant Thomas Christie ("Christie") appeals his child pornography conviction and sentence that followed his conditional plea of guilty after the district court denied his motion to suppress evidence seized from a computer located in a business office in his residence. Christie challenges the district court's order denying his motion to suppress and the validity of his conditional plea. For the reasons that follow, we AFFIRM.

I. BACKGROUND

In March 2004, James Podboy ("Podboy"), a

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

special agent with Immigration and Customs Enforcement of the Department of Homeland Security, presented an application for a search warrant to a federal magistrate judge. In the affidavit submitted in support of the application, Podboy described the government's investigation that revealed that Christie had purchased access to Internet web sites containing child pornography. Podboy stated in his affidavit that he had probable cause to believe that evidence of child pornography would be found at Christie's residence located at 3418 Seminole Drive, Shreveport, Louisiana 71107. An attachment to the application described 3418 Seminole Drive as "a single family, one level home" and detailed the exterior of the premises.

Podboy's affidavit further stated that he had checked Louisiana motor vehicle records to verify that Christie lived at 3418 Seminole Drive and that surveillance of the premises in the previous month had revealed two vehicles registered to Christie parked in the driveway. Podboy averred that the cable company records showed Christie was receiving high speed Internet service at 3418 Seminole Drive using the same email address contained in transactional information discovered in the government's underlying investigation. Podboy also attested that a criminal history check revealed that Christie had prior convictions for oral sexual penetration of a child less than thirteen years old and interstate transportation of child pornography.

On March 25, 2004, the magistrate judge signed a search warrant permitting police to search and seize, inter alia, computer equipment, data and

memory storage devices, computer files, photographs, or any other visual depictions of minors engaging in sexually explicit conduct, found in the "[r]esidence of Thomas Christie at 3418 Seminole Drive, Shreveport, Louisiana 71107." The following morning, agents executed the search warrant. Instead of entering by force, agents called Christie who returned home and, after being told that the agents had a search warrant, opened the garage door and allowed the agents to enter the residence through a door in the garage leading to the interior of the home. Once inside, agents seized three hard drives from two computers, all of which contained child pornography. Two of the hard drives were from a computer located in the living room/guest bedroom area; the third hard drive was from a computer located in an interior room that was used as a business office. On October 13, 2004, Christie was indicted on one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).[1]

On June 3, 2005, Christie moved to suppress the evidence of child pornography discovered on the computer located in the business office within his residence. In support of his motion, Christie testified that the office was for Creative Home Improvement Services ("CHIS"), a construction business in which he was a fifty-percent owner. He testified that the business office had two entrances,

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[1] There was also a count in the indictment alleging forfeitures of certain property, but it was later dismissed by the government pursuant to Christie's plea agreement.

one exterior door in the garage and one interior door in the residence, both of which were marked with placards identifying the room as a business office. He conceded that the sign on the exterior door in the garage "probably fell off" because it was secured with scotch tape "and it does fall down." He also admitted that if the interior door was open, agents would not have seen the business placard on the outside of the interior door because the door opens against the wall. Christie testified, however, that there were other indications that a business was being conducted in his residence, including a trailer with a sign on it parked outside the residence, vehicles with signs on them parked in the driveway, and construction-related tools and equipment located on the side of the house.

In opposition to Christie's motion to suppress, the government introduced Agent Podboy. Podboy testified that he entered the residence directly through the garage and did not recall seeing the exterior door leading from the garage directly into the business office. He also testified that he did not see any type of business sign inside the garage. As for the interior door in the residence displaying a business sign, Podboy testified that the door was open and unlocked. When questioned about the exterior indications of a business being operated out of the residence, including vehicles displaying the business logo and business equipment and a trailer in the yard, Podboy responded that he was not aware there was a business inside the residence.

On August 12, 2005, the magistrate judge issued a Report and Recommendation denying the

motion to suppress. The magistrate judge found, as an initial matter, that the office was not a separate structure but was simply a room within the same structure. He further found that if the garage door to the residence is pulled down in the closed position, as it was when the agents conducted surveillance of the property prior to the search, "there is nothing apparent from viewing the residence which would indicate to anyone that a construction company is operated from an office within the residence." The magistrate judge rejected the evidence introduced by Christie that there were indications of a business from the exterior of the home. He found that none of the equipment was inconsistent with that found in other yards in the area. With regard to the vehicles, he found that "many employees bring their work-related vehicles home in the evenings, and the mere presence of a vehicle or small flatbed trailer bearing a company's designation would not necessarily lead a reasonable agent to believe that a business is being conducted from a home office within the residence."

The magistrate judge made several findings of fact related to Christie's argument that the agents knew or should have known there was a business office once they were inside the garage of the residence. First, he found that "[i]f there was a sign on that exterior door [from the garage into the home office] at any time prior to the search, the sign was removed or had fallen off (as it was prone to do) before the search." Second, he found that the sign on the interior door leading into the office "is not visible if that interior door is left open, and there is

no evidence in this case that the door was closed." Finally, he found that "the videotape of the home office at the time of the search shows that the layout and items located in the home office are similar to many spare rooms in homes that contain computer desks, recliners, televisions, family photographs and the like." He concluded that even if the interior door to the office was closed and locked and even if the agents saw the business sign, "a search warrant supported by probable cause to search the residence for child pornography included authorization to enter and search that room." On September 27, 2005, the district court concurred with the findings of the magistrate judge and denied Christie's motion to suppress.

On August 29, 2005, Christie entered a guilty plea conditioned on his right to appeal the district court's denial of his motion to suppress evidence from the business office. The district court accepted the conditional plea and sentenced Christie to the statutory minimum of ten years in prison and five years of supervised release. See 18 U.S.C. § 2252A(b)(2). Christie filed this timely appeal.

II. DISCUSSION

A. Denial of Motion to Suppress

Christie claims that the agents exceeded the scope of the search warrant by searching the CHIS business office located within his residence. He argues that the agents knew or should have known the office was a distinct unit separate from the residence because there were signs on the exterior and interior doors to the office and on the vehicles and a trailer outside the house indicating it was for

business and not personal use. In reviewing a district court's ruling on a motion to suppress, we review questions of law de novo and the district court's findings of fact for clear error. United States v. Carrillo-Morales, 27 F.3d 1054, 1060-61 (5th Cir. 1994).

Christie has not demonstrated that any of the district court's factual findings were clearly erroneous. Although he argues that the district court failed to make a specific fact finding on whether the agents who conducted the initial sweep of his residence opened the interior door to the office, and thus concealed to the searching agents that the room belonged to a business, he has pointed to no record evidence refuting the district court's finding that "there is no evidence in this case that the door was closed." To the extent Christie is arguing that the district court should have made a specific finding on the activities of the sweeping officers, we find no merit in this contention. The trial court is not required to make findings on all facts presented or to make detailed evidentiary findings. Rather, "if the findings are sufficient to support the ultimate conclusion of the court they are sufficient." Strickland v. W. Horace Williams Co., 230 F.2d 793, 798 (5th Cir. 1956) (internal quotation marks and citation omitted).[2]

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[2] Christie also appears to be arguing that if the sweeping agents opened the interior door to the office, then the "collective knowledge" of law enforcement personnel at the site would have provided notice that the scope of the warrant was being exceeded. Christie does not point to any authority to support his

The district court's findings support its conclusion that the agents reasonably searched the office as part of the premises described in the search warrant. The garage, which served as the entrance to both the residence and the office, did not bear separate municipal numbers or identifying marks to indicate the existence of two separate premises. The office was part of the residence; it was simply a room within the same structure. The address in the warrant, 3418 Seminole Drive, served as the address for the residence and the office. On these facts, we hold that the agents did not exceed the scope of the warrant by searching the CHIS office. Our conclusion is supported by cases with similar facts before the Supreme Court and this circuit. See Maryland v. Garrison, 480 U.S. 79, 88 (1987) (concluding that the officers' search of the defendant's apartment was reasonable where the objective facts available to the officers at the time of the search suggested no distinction between another individual's apartment and the defendant's apartment located on the same floor); Carrillo-Morales, 27 F.3d at 1064 (holding that the officers acted reasonably and in good faith

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contention. The only case cited by Christie, United States v. Waldrop, 404 F.3d 365 (5th Cir. 2005), does not support Christie's ultimate conclusion regarding the collective knowledge doctrine. We therefore decline to visit this issue any further on appeal. See Dardar v. Lafourche Realty Co., 985 F.2d 824, 831 (5th Cir. 1993) ("Questions posed for appellate review but inadequately briefed are considered abandoned.").

in assuming the warrant to search the defendant's body shop covered the defendant's residence where the residence was inside the same building as the body shop, the outside of the building displayed only the municipal number for the body shop, and the buildings were similar in appearance and separated by an awning); United States v. Prout, 526 F.2d 380, 388 (5th Cir. 1976) (rejecting the defendant's argument that the description in the warrant authorized only a search of the realty office and was insufficient for the search of an upstairs apartment where, although the business and residence had separate addresses and separate utility meters, there were no identifying marks to indicate the existence of two separate premises). Accordingly, we affirm the district court's order denying Christie's motion to suppress evidence from the office located in his residence.

B. Validity of Conditional Plea

In his supplemental brief before this court, Christie challenges for the first time the validity of his conditional plea agreement. He argues that his guilty plea conditioned on a non-case-dispositive pretrial motion is invalid and must be vacated. Because Christie did not present this issue in his original brief before this court, he has waived it, and we cannot consider it on appeal. See United States v. Ogle, 415 F.3d 382, 383 (5th Cir.), cert. denied, 126 S. Ct. 837 (2005) ("Our cases make it clear that an argument not raised in appellant's original brief as required by FED. R. APP. P. 28 is waived."); see also United States v. Cruz-Barraza, 157 F. App'x 768, 770 (5th Cir. 2005) (unpublished), cert. denied, 126 S. Ct. 1814 (2006)

(refusing to consider issues raised in the defendant's supplemental brief "because issues not raised in an appellant's initial brief as required by FED. R. APP. P. 28 are deemed waived").

III. CONCLUSION

For the foregoing reasons, we AFFIRM Christie's judgment of conviction and sentence as imposed by the district court.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 05-31080

FILED
JAN 22 2007

UNITED STATES OF AMERICA
Plaintiff —Appellee

vs.

THOMAS CHRISTIE
Defendant—Appellant

Appeal from the United States District Court for the Western District of Louisiana, Shreveport

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ON PETITION FOR REHEARING

Before SMITH, BENAVIDES, and PRADO, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:
s/Edward C. Prado
United States Circuit Judge

REHG-2